IN THE UNITED STATES DISTRICT COURT
OF WESTERN PENNSYLVANIA

ALEXIS D. JOHNSON, — CIVIL DIVISION

Plaintiff, — No. 20-00885

vs.

PG PUBLISHING COMPANY,

Defendant.

- - - - - - - - - - - - - - - -

BLOCK COMMUNICATIONS, INC., PG PUBLISHING COMPANY, — No. 20-1222

Plaintiffs,

vs.

PITTSBURGH COMMISSION ON HUMAN RELATIONS,

Defendant.

Transcript of VIDEOCONFERENCE ORAL ARGUMENT
held on FEBRUARY 11, 2021
United States District Court, Pittsburgh, Pennsylvania
BEFORE: HONORABLE J. NICHOLAS RANJAN, DISTRICT JUDGE

APPEARANCES:

For the Alexis Johnson: Samuel J. Cordes, Esq.

For PG Publishing Company: Robert Corn-Revere, Esq.
Zachary N. Gordon, Esq.
Ronald Gary London, Esq.

For Pittsburgh Commission: Lawrence D. Kerr, Esq.
Wendy Kobee, Esq.
Michael E. Kennedy, Esq.

Court Reporter: Karen M. Earley, RDR-CRR
412-201-2660

Proceedings reported by mechanical stenography.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(February 11, 2021, 10:00 a.m.)

THE DEPUTY CLERK: Good morning.

The United States District Court for the Western District of Pennsylvania is now in session. The Honorable J. Nicholas Ranjan presiding.

The matters now before the Court are Alexis D. Johnson vs. PG Publishing Company at Case No. 20-cv-885 and PG Publishing Company, et al., versus Pittsburgh Commission on Human Relations at Case No. 20-cv-1222.

THE COURT: All right. Good morning, everyone.

Why don't we start by entering appearances for the record beginning with the Johnson case. Who do we have for the plaintiff?

MR. CORDES: Samuel Cordes, Your Honor.

THE COURT: All right. Great. Good morning.

For the defendants in that case?

MR. CORN-REVERE: This is Robert Corn-Revere from Davis Wright Tremaine.

THE COURT: All right. Good morning.

Then for the other case, PG Publishing versus Pittsburgh Commission on Human Relations, Mr. Corn-Revere, I presume, you represent the plaintiff in that case; is that correct?

MR. CORN-REVERE: That's correct, Your Honor.

THE COURT: All right. Then who do we have for the defendant in that case?

MR. KERR: That would be me, Lawrence Kerr, K-e-r-r. I have co-counsel Mr. Kennedy and Ms. Kobee, but I will be arguing.

THE COURT: Good morning to everyone.

We are here on two motions to dismiss in both of these cases. I scheduled this to all happen at the same time. I'm not sure it had to be the case but I just wanted to avoid any overlap. There may not be any overlap because the issues may be separate enough.

My plan was to start with the Johnson case, hear the parties out on the motion to dismiss on that and then move into the other case, the Pittsburgh Commission on Human Relations case, but I am also open to any suggestions if there is a different or better way to handle it.

Any views or strong opposition to that plan, Mr. Cordes?

MR. CORDES: No, Your Honor. I think your plan -- I think that works well for me at least.

THE COURT: Mr. Corn-Revere?

MR. CORN-REVERE: We have the same reaction. I think that organization works well for both cases.

THE COURT: Okay. Mr. Kerr, are you on board with that?

MR. KERR: Yes, we are fine with that.

THE COURT: Let's start with the Johnson case.

Mr. Corn-Revere, since it is your motion, you may proceed.

MR. CORN-REVERE: Thank you, Your Honor.

May it please the Court, our position is dismissal in this case is warranted based on four basic facts about which there really is no dispute.

First, Ms. Johnson interjected her personal views into a public debate through her Twitter feed and then asked Post-Gazette editors to assign her to news coverage of those same events.

Second, the Post-Gazette editors declined Ms. Johnson's request to cover protest coverage explaining that the Post-Gazette had a social media policy that applied journalistic standards to avoid the perception that the newspaper mix is commentary with news coverage.

Third, that same policy was applied to all Post-Gazette staff members who reposted the Johnson tweets and did so regardless of race.

And fourth, no one was disciplined, demoted, or financially sanctioned as a result.

So the sum total of Ms. Johnson's claim was that the Post-Gazette editors declined to green light three story ideas she pitched on June 1. She was not reassigned, nor was she removed from any stories she had previously covered, nor was she prevented going forward from covering social justice issues in general or Black Lives Matter in particular.

The amended complaint fails to state a claim under Section 1981 and the relief Ms. Johnson is requesting would violate the First Amendment because it would intrude on the Post-Gazette's ability to adopt and enforce its journalistic standards.

Now there is no plausible Section 1981 claim either for discrimination or retaliation. That's true for three basic reasons:

First, there was no impairment of any contractual right and no discrimination. Reporters don't have a contractual right to demand that editors accept the story ideas they pitch. This is a fact of life accepted by journalists in newsrooms all across America and it's confirmed in cases involving labor law.

For example, in *Ampersand Publishing v. NLRB*, the D.C. Circuit confirmed that this is not a legitimate employee concern and said that editorial policies do not constitute a term or condition of the employment.

Ms. Johnson asserts that the denial of her story requests is a legitimate concern under Section 1981 because she is African-American, but this poses the wrong question.

As the Supreme Court confirmed just last term in *Comcast Corporation v. National Association of African American-Owned Media*, Section 1981 directs our attention to the counterfactual, in other words, what would have happened if the plaintiff had been white; and in this case, we know from the face of the complaint what the answer to that question is. We know that all reporters and Post-Gazette staff members who reposted the Johnson tweet were treated exactly the same way.

So there is no impairment of contractual right and no discrimination and Ms. Johnson's claim fails at the threshold.

Second, there was no adverse employment action. Ms. Johnson doesn't even allege any change in her compensation, terms, conditions, privileges, employment. She was not reassigned, she was not removed from any story that she was covering. Editors not accepting a story pitch is simply not an adverse employment action.

Apart from not getting her requested assignment, she alleges nothing else in her complaint.

Not everything in the workplace that makes an employee unhappy is an adverse employment action.

THE COURT: Mr. Corn-Revere, I know in the amended complaint there are several allegations pertaining to what I guess I would call a comparator, another employee, a white employee who plaintiff alleges tweeted about something similar and the allegation is that the Post-Gazette did not prevent that individual from covering stories about the protests.

Can you talk to that? Does that make this case a little bit different than a situation where there's just sort of an exercise of a pure editorial decision by the Post-Gazette?

Here my sense of allegations in the complaint is that that may be fine but here how the Post-Gazette has treated white comparators gives rise to discrimination and may -- I'm not sure if it touches on the impairment of a contract or adverse employment action or disparate treatment but if you can talk to that, I would appreciate it.

MR. CORN-REVERE: Certainly, Your Honor. Let me address that.

These are the comparisons that appear at Paragraphs 31 to 33 of the complaint and there are really two that are posed here.

One is allegations regarding another staff member named Joshua Axelrod, that's Paragraphs 32 and 33, and the other one involves allegations, some social media activity after the shootings of the Tree of Life Synagogue. That's at Paragraph 31.

Now there is very little description here to show whether or not these allegations compare in any way, and the Third Circuit decision in *Curay-Cramer v. Ursuline Academy* says where you have allegations, you have to show that those comparators are in many respects the same. As you'll recall, the Third Circuit upheld the dismissal at the motion to dismiss stage where there was a lack of any sort of real comparison.

Let me focus on those two in particular. First, with respect Joshua Axlerod, the allegations made that he posted something during the riots of someone being a scumbag and he wasn't immediately taken off coverage of the protests.

Two things about that. One is it wasn't any kind of viral tweet and as soon as the Post-Gazette editors became aware that he had been involved in activity, he was also taken off any kind of coverage.

Some kind of unspecified delay before the same treatment is accorded doesn't rise to the level of a discrimination between a white employee and other

employees and we're simply comparing very different tweets and suggesting that the actions towards them was somehow different.

Secondly, the allegations in Paragraph 31 regarding the Tree of Life Synagogue, again, as limited as the factual allegations are, we have no idea what was said or whether or not it was simply someone expressing sympathy for the victims of these horrible shootings.

I suspect that if anyone had been involved in Twitter activity saying don't worry about the killings of the Tree of Life Synagogue, it's not worse than a Kenny Chesney concert, I suspect that they would have been taken off any coverage right away but, again, it simply is not comparable. It has to be a similar kind of situation before you can say there is actual discrimination.

What we do know is from Paragraph 29 of the complaint where people posted the same tweet, the same Johnson activity, all of them were instantly removed from also covering events about which they had expressed opinions. So there is absolutely no credible allegation of any kind of discrimination here.

Now there is a saying with respect to whether or not there was adverse employment action. There is no dispute that there was no reassignment, no demotion, no

dock in pay. Now, it's true there's been an attempt to characterize what happened as some kind of punishment, but as I say, reporters don't have story pitches accepted all the time. That hardly counts as punishment and how the plaintiff chooses to characterize the events doesn't change them for purposes of the law. There simply was no adverse employment action.

Third, there was no retaliation. Now, in the Third Circuit, as a prerequisite to bringing a retaliation claim, there has to be an underlying Section 1981 violation. Since we have already shown there was no adverse employment action, this claim fails at the threshold.

This is a requirement that the Third Circuit has affirmed in *Estate of Oliva v. New Jersey*. We raised that in our motion to dismiss, and there's been no response. That threshold question simply goes unanswered, but beyond that, for a retaliation claim, there has to be an allegation of protected activity and the complaints in Ms. Johnson's tweets about society in general simply don't constitute protected activity for purposes of Section 1981.

Once, again, the Third Circuit decision in *Curay-Cramer v. Ursuline Academy* is both controlling and is dispositive of this question.

Now, again, that case upheld the dismissal of the discrimination claim at the motion to dismiss stage and it went on to say that to be protected activity, the opposition to an illegal employment practice must identify the employer and the practice.

Now we have none of that here. There was nothing in Ms. Johnson's tweets that says anything about employment practices, much less the Post-Gazette.

In fact, if you look at Paragraphs 13 to 17 of the complaint, what it really is saying is Johnson sought to, quote, ridicule the idea that protesters in general and specifically African-American protesters are destructive looters. There is nothing here about employment or complaining about discrimination on the job. That is a prerequisite to bringing a retaliation claim.

Instead, Ms. Johnson claims that protesting about conditions in society in general qualify for protective activity, but *Curay-Cramer*, the Third Circuit expressly rejected this theory of retaliation. The operative language in the opinion says we are not aware of any court that has found public protester expressions and belief to be protected conduct absent some perceptible connection to the employer's alleged illegal employment practice. That's exactly what is going on

here.

Complaints to editors later on about the fact that she wasn't assigned the stories that she requested does not satisfy this threshold. That doesn't constitute a protected activity to make a retaliation claim because we have a chicken and egg problem.

The original argument was that it was her activity on Twitter that was protected communication and then when the employer takes action based on its policies to say we're not going to assign you to those topics, that happens after the fact. Once, again, the *Curay-Cramer* case spoke to this directly saying that an employer need not refrain from carrying out a previously reached employment decision because an employee subsequently claimed to be engaging in protected activity.

So what happened with meetings and editors later when she was displeased that she wasn't given the assignments she requested doesn't bridge that gap.

Finally, First Amendment bars Ms. Johnson's claims under Section 1981. Now the question here isn't whether or not newspapers are subject to generally applicable employment laws. No one has suggested that they are not subject to them.

The question is whether a newspaper's

editorial judgment, including its ethics rules, can be the subject of those complaints.

In this case, the complaint is nothing more than a challenge to editorial policies like those adopted by the Society of Professional Journalists, like major news organizations like the New York Times, the Associated Press, the Washington Post, and in this case, the social media policy of the Pittsburgh Post-Gazette.

Now courts in employment cases have uniformly held that the application of general labor law in newspapers in ways that intrude on those kind of ethical rules and editorial standards can't be allowed under the First Amendment. This happened in many cases involving the National Labor Relations Board and cases like that where it said that general labor issues simply cannot intrude on those sorts of professional standards and editorial judgments.

It was upheld in *Newspaper Guild of Greater Philadelphia v. NLRB* and other cases that we mentioned in our papers. It was upheld in response to a Washington state statute in *McClatchy Newspapers v. Nelson.*

THE COURT: Let me ask you this. My understanding of the First Amendment issue is that the plaintiff here, Ms. Johnson, is basically I think

asserting that the Post-Gazette's basis or decision to remove her from these stories or its discriminatory treatment of her based on application of editorial discretion or editorial control and judgment was pretextual.

So the Post-Gazette might be absolutely right that if it properly exercised its editorial control and judgment, it would bar this particular claim or the claims in this case, but as I understand the plaintiff's argument, I mean I could be wrong, but I think where I think they are going, yeah, that's all great but it's pretextual. That's not the real reason and, in fact, we have statements from editors that suggest that it wasn't based on editorial control and judgment but instead based on racial animus, the decision was based on racial animus. What is your response to that?

MR. CORN-REVERE: A couple things, Your Honor.

First, in terms of the claims about pretext, the allegations about editors may be a comment or added in the amended complaint and really makes some sort of unspecified reference to statements made by Karen Kane that don't directly link to Alexis Johnson.

They were really to begin with, as we point out in our pleading, we think those allegations are fabricated; but if you accept them as true for a purpose

of a motion to dismiss, they don't make a difference here.

First of all, the question of pretext is not relevant where you have black and white reporters being treated exactly the same way, where you have a minority employee being singled out and then it is argued that they were treated differently and the pretext argument is made, that's one thing.

Here on the face of the complaint the plaintiff says all reporters who conducted this activity in violation of policy were treated the same way. So the question of pretext really is not relevant.

Secondly, as a matter of law, in those cases where pretext has been argued, the Courts have held that the First Amendment still must prevail. This was what the D.C. Circuit said in *Ampersand Publishing Company v. NLRB.* It says that even if the Board properly found that Ampersand proffered pretextual reasons for its actions, the Board's analysis was tainted by the mistaken belief that employees had a statutorily protected right to engage in collective action aimed at limiting Ampersand's editorial control over the free press.

So, where you have a fully protected First Amendment right to engage in adopting editorial

standards and applying them, you can't simply get around that by trying to argue that there were bad reasons for adopting things they had a right to do.

Here, again, it doesn't come up because the face of the complaint tells us that all members of the race were all treated exactly the same way.

Even if you do have an allegation of pretext and it was relevant in this context, you still have to make a prima facie showing of, first, that there was an adverse employment action; and secondly, that there was discrimination. Those simply don't come up. That, by the way, was affirmed in *Daily News v. NLRB*.

So, again, even if we fully expect the allegations of pretext to be repeated here, as they were in the papers, they simply don't overcome the First Amendment claim.

This was also affirmed in other cases involving allegations of discrimination. The Middle District of Tennessee dismissed a 1981 claim in *Claybrooks v. American Broadcasting Company* where it was argued that the casting of the bachelor and bachelorette were based on discriminatory motives and the Court basically said it doesn't matter because in matters of editorial judgment, those decisions simply can be made.

This is a principle in at least certainly

since 1995 when the Supreme Court unanimously decided *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, that even in allegations of discrimination, that First Amendment consideration still overrides. So that as a matter of law, the case should be dismissed on First Amendment grounds.

Now, I'll close simply by addressing one of the things Ms. Johnson claims about this. She said she is not claiming that her case says that the defendant should have published any particular article or that she is not trying to intrude on news judgment but that's precisely what is going on here because the entire case boils down to whether or not you can sanction a newspaper or require them to cover certain things because a reporter was upset that three stories she pitched weren't accepted by the editors.

There is no other way to look at it than to say if the Court were to rule in her favor, it would either penalize the newspaper for its not adopting, not having those stories, or on a going forward basis, would have to accept those story pitches.

One thing that's probably worth noting is that the claims for equitable relief in the complaint are moot at this point because Ms. Johnson left the Post-Gazette last October, something that hasn't been

noted in the papers, and if anything, she has gone on to far greener pastures. She is now a national correspondent for Vice News doing video reports. Her new position has been touted on the alumni website of Temple University. She has appeared on panels. So it's hard to say that this incident that prompted the lawsuit has damaged her in any way or is really subject to any ongoing relief of an equitable basis as is requested in the complaint.

So for all of those reasons, Your Honor, we think the case should be dismissed.

THE COURT: All right. Thank you, Mr. Corn-Revere.

Mr. Cordes, I can hear from you now.

MR. CORDES: Thank you, Your Honor.

Your Honor, this is a case about what the Post-Gazette did but it's more importantly, a case about why and here on a Rule 12(b)(6) record, the record shows that the defendant judged Ms. Johnson both by the content of her tweets and also by the color of her skin.

It judged her by the content of her tweet, which was a complaint of race discrimination in the equal benefits or like punishment clauses according to the U.S. Code Section 1981, and it also judged her by the color of her skin. We know that. We know it

because the complaint pleads that the defendant's own decisionmaker admitted as such.

Paragraph 21 of the amended complaint pleads the defendant's decisionmaker informed Ms. Johnson that because she had opposed and spoke out about racism, she was precluded from covering any stories about discrimination.

On a Rule 12(b)(6) motion, that is the record, and defendant's defenses and things they would say are all very interesting and all very relevant, I suppose, once we get to discovery, but on a 12(b)(6), that is to be believed and any inference that is to be drawn from that is the one that favors Ms. Johnson.

How do we know that the color of her skin was taken into account? The amended complaint pleads it. Paragraph 26, during the first week of June 2020, that is shortly after the tweet, the decisionmaker complained to another assistant managing editor that I can't do anything now about black people. I have to pick better targets.

Again, Your Honor, the Third Circuit as recently as two weeks ago said a complaint need only raise the plausibility and I think those paragraphs themselves do it.

Now, I would like to address the defendant's

kind of arguments about the protected conduct. Your Honor, this is not a case under Title VII, at least not at this point because it is still in the administrative procedure. It's under 42 U.S.C. Code Section 1981 which is not an employment statute. It involves two issues.

One, it precludes race discrimination in the making and enforcement of contracts and any part of the contractual relationship. It was amended in 1991 to make it specific that a term or condition of employment is part of the contractual relationship. It's 32 U.S. Code 1981(a) I believe is the statute. Section 1981 precludes race discrimination in the provision of full and equal benefits and like punishments.

Well, why am I going over that? Well, because the Third Circuit has talked about, and it was, in fact, a leader in talking about what that means, what the full and equal benefits and like punishment means; and what it means, Your Honor, is that complaints or actions by either selective enforcement of the law or actions of different treatment by police predicated on race is a violation of the full and equal benefits clause.

My friend says in his papers, well, that doesn't matter because we are not a public employer and I agree, but the nature of retaliation, Your Honor, as the Supreme Court has said in the *Cracker Barrel* case

and in the *Burlington* case, two things.

First, it does not have to be about the actual plaintiff, that is, a person who complains about race that contravenes -- race that would contravene Section 1981 is engaging in protected conduct. So what that means is the race discrimination Ms. Johnson opposed need not specifically involve her. It's someone else's right to be free of racial discrimination is clearly encompassed and we know that because the Third Circuit's own model jury instructions instruct the Court to charge the jury as such.

The race discrimination that is the subject of protected opposition need not be undertaken by the retaliation of plaintiff's own employer or by the defendant in this case. The Courts have repeatedly said that, including the Supreme Court in the *Cracker Barrel* case.

THE COURT: I'm not familiar I guess with the *Cracker Barrel* case. Tell me what happened in that case, if you can.

MR. CORDES: It's cited in the papers, Your Honor. It's *Cracker Barrel West v. Humphries*. It's 553 U.S. 442. In the case, the issue was whether retaliation claims are encompassed by 42 U.S. Code 1981 because the language of the statute does not

specifically say the word "retaliation."

Justice Breyer discussed both why it was and also what it encompassed and I'll read from the case specifically, Your Honor.

Retaliation cognizable under Section 1981 includes claims by an individual whether black or white who suffers retaliation because he has tried to help different individuals suffering from racial discrimination.

So it takes a broad, a very broad look, and every circuit sort of has agreed, it takes a broad look at what is protected conduct under Section 1981. It reminds us, for example, that 1981 covers far more than employment, although it does cover employment because employment is a contractual relationship.

When I agree to work for you for five dollars an hour, we created a contract, whether it's a formal sort of thing or not, even if it's an at-will contract and the Supreme Court has discussed that issue, too.

So the fact that we have no specific contractual right to any specific assignment is again interesting but not really all that relevant under Section 1981 jurisprudence according to what the Supreme Court says.

THE COURT: Before I ask you this, I think I

hear some feedback from somebody else on the line, so if everybody else can mute their line, I would appreciate it.

Thank you.

Tell me I guess maybe the best or most factually analogous case on protective activity. It seems like most of the cases I have seen, they involve either the employee or the employer, that the protective activity, the employer, some entity may be as related to the employer, the conduct that touches on employment.

Here you had a situation where the tweet seems to be a broader commentary on a societal issue. I'm trying to figure out one, what is sort of the best factual analogous case to this one?

Two, how do you draw the line? Obviously, there's got to be some line drawn? What are the principles here that would trigger something being a protective activity in your view?

MR. CORDES: Your Honor, let me just take -- I'm not avoiding the direct question. I want to take a small side trip for one second.

I'll give you an example of something that would be. If you remember after the January 6 insurrection of the Capitol, there was a number of both commentators, politicians and I believe even -- well,

clearly politicians and commentators that were saying if that crowd had been African-American and had done the same thing, there would have been mass shootings of them and we would be having a hundred George Floyds all over again.

That kind of conduct is not all that dissimilar to what the tweet was in this case.

Now, your question was a lot of the cases, Your Honor, I agree, arise in the context of Title VII and in Title VII, what the statute says is that it makes it an unlawful employment practice for an employer to either retaliate against an employee but not its employee. That's the distinction that's been made by a number of courts.

So, for example, in the *Flowers v. Columbia College Chicago* case, I believe it is cited in our brief, the employee of Columbia College complained about discrimination at a prior employer. There is a case in this district by, I guess by former Chief Judge Conti, it was affirming a magistrate judge's decision. It was *Cestra v. Mylan*. I don't believe this is cited in the briefs, but in that case, it was a retaliation case brought under the False Claims Act where Mr. Cestra had made a complaint or filed a qui tam action against a former employer and then moved on to a different

employer and once the seal was lifted on the qui tam, Mylan, who is the defendant, fired him because of that and Mylan moved to dismiss alleging that it only affects actions where he complains about us and the Court denied that.

Judge Conti certified it for Third Circuit review and the Third Circuit didn't even take the case because it was so obvious, the language of the statute.

Now, having said that, in the 1981 context, there are not many direct retaliation cases that are brought where this is addressed under the equal benefit like punishment clause. I think the *Cracker Barrel v. Humphries* case is a very good starting point, though, because it speaks about the issue that the whole notion of Section 1981 was to protect the people who took the side of former slaves during the reconstruction and the statute was passed in 1866, right after the Civil War and was, indeed, put into place to protect both former slaves under the Thirteenth Amendment but also those who provided support for them.

The case I can point you to, though, Your Honor, that is outside of the *Cestra* matter, there is a case called *Hoffman v. Rubin* out of I believe it's the Eighth Circuit. It's cited in the materials. I believe it's the Eighth Circuit, Your Honor.

In *Hoffman v. Rubin*, again, a Title VII case but instructive on the issue. Mr. Hoffman went on 60 Minutes television show and had a limited discussion about sexual harassment, didn't complain specifically about my employer but talked about the notion of sexual harassment at the time that his employer was going through a bunch of sexual harassment allegations.

Again, a limited opinion to the extent that the Eighth Circuit simply said that is one clear example of what is protective conduct because he was talking about or opposing actually is the word a matter that would have been a violation of Title VII.

The Supreme Court in every situation where it has addressed what is protected conduct has broadened that definition. For example, in the *Crawford* case, again, cited in the materials, the Court said even standing pat in the face of an employer's racist policy, that is saying I'm not going to do that or I'm going to avoid helping that is protected conduct. It doesn't have to be active sort of conduct.

Again, Your Honor, the *Caplan* case cited in our materials involved a situation not totally dissimilar from this. There was a Section 1981 claim brought by Ms. Caplan who alleged that a tweet or a Facebook post, I guess it wasn't a tweet, that she liked

or reposted, made fun of the owner of the Los Angeles Clippers. If you recall a few years back, Your Honor, he had made some very racist statements and the post was a picture of a Ku Klux Klansman with a Los Angeles Clippers' uniform on and the post was Tuesday night is bobble head night at the Clippers and giving out free Ku Klux Klan sheets, something like that.

There were two posts, and the case went to the Third Circuit on whether two things: Whether there was protective conduct, and whether there was causation that caused it.

The Third Circuit found that the post about the Klan was protected. It affirmed the judgment below because there was another post that was posted that said it was not protected and, therefore, irrespective of that, though, the plaintiff would have been fired; but, again, a non-precedential opinion written by Judge McKee but still instructive on what kind of conduct had to do.

This person worked for I think it was one of the Limited stores, Victoria's Secret or some such thing, didn't work for the LA Clippers, had nothing to do with employment of the LA Clippers but was posting a post, and Judge McKee said, and I quote this in the brief, there is a factual question about whether -- wait. Let me just see so I have the direct

quote. The fact may well exist as to the Sterling post, its message could properly be interpretive of mocking a racist business owner just as Caplan explains and, therefore, it fell under the protective umbrella of Section 1981.

There is a mistake in the opinion where Judge McKee wrote it's protected under the First Amendment but it was clearly a Section 1981 claim. It was a typographical error in the opinion which my opponent seems to make much about it, but the Third Circuit must not have known what it was talking about. I don't know if this Court gets to do that, makes those decision; but nonetheless, that is an example of protective conduct. Out of this district actually in a very recent case, I believe it was 2017 or '18, where a 1981 claim dealt with a non-employer of the plaintiff but conduct that was opposing racial discrimination.

In that situation, it would have been racial discrimination in a contract but there is no difference for opposing racial discrimination that would be a violation under the like benefit clause and the fact that someone is complaining about government discrimination if it motivates the current employer. I agree, Your Honor, that's where the link ultimately needs to be made, and I think on a 12(b)(6), the link is

made because the defendant said so.

THE COURT: I guess if I'm understanding the line here, the standard is if an employee makes a comment that deals with racial discrimination of any kind, then your view would be that is protective activity; and if the employer takes an adverse action against the employee for making a comment with respect to racial discrimination, I guess, is that kind of the standard, then that would be protective activity?

MR. CORDES: I think the Court doesn't have to go that far, Your Honor. I think the standard needs to be racial discrimination that is violative of the statute or that the employer would reasonably believe to be violative of the statute.

In the Title VII context, although, again, the Supreme Court has not said that it has to be employment related. In fact, the Supreme Court has said just the opposite. It says you can retaliate against someone outside of the employment context, but for our purposes here, if there is a reasonable good faith belief that that complaint would be a violation of the equal like benefit or equal treatment clause of Section 1981, that is sufficient; and in pleading that in a complaint, it simply needs to have done that.

Is it reasonable to believe that a complaint

that is not dissimilar in any way, Your Honor, from a complaint that had the insurrectionists been African-Americans, they would have been shot by the police. That's exactly what Ms. Johnson said. Had the people at the Chesney concert would have been African-American -- I'm sorry. Vice versa. Had the Black Lives Matter protesters been treated or were treated less well than the Kenny Chesney concertgoers. It is an allegation of selective enforcement of law and different treatment by police predicated on race and that is the complaint that links it to Section 1981.

THE COURT: Going to your point, there has to be a link to the statute. There has to be a violation of the statute of some kind. It has to be violative of Section 1981.

As I read Section 1981, it is broader than Title VII but there is a tie-in to a contractual impairment or terms, violation of terms or conditions.

Does there not have to be -- I guess explain to me in what way here this is a violation of Title VII. I'm just a little bit concerned with I guess the position here in the complaint that it's too broad. If anybody makes an allegation with respect to a problem about race and society that does not impact any type of employment relationship or contract, it becomes an

unmanageable standard. I'm just trying to figure out what would be the line.

MR. CORDES: Sure, Your Honor. The standard is not unmanageable in what we're talking about here. While the Court absolutely correctly recited the first part of Section 1981, there is a second part, Your Honor.

What it says, and let me pull it up. I learned this in law school. The first thing you want to know about the statute is read the statute.

Section 1 says, All persons shall have the same rights to enforce contracts; but the second clause of Section 1981 says, and to the full and equal benefit of all laws and proceedings as is enjoyed by white citizens and shall be subject to like punishment.

Now what the Third Circuit has said about that in *the Mahone v. Waddle* case back in 1977 is that racially motivated misuse of government power falls within the ambit of the state's equal benefits and like punishment clause; and then in the *Hall* case, which is *Hall v. Pennsylvania State Police*, again this is cited in the materials, the Third Circuit says, Selective enforcement of laws or different treatment by police predicated on race are encompassed within the equal benefits and like punishment law.

So, what we have here is the tie-in to the Section 1981 violation. Ms. Johnson was complaining about like punishment and selective enforcement of laws because she was saying that had the Black Lives Matter protesters been treated the way the Kenny Chesney people were or conversely, had the Kenny Chesney people been treated the way the Back Lives Matter protesters were, there would have been multiple arrests, et cetera. Again, that's the link. It's not an ongoing, any kind of race-based complaint.

Those two statutes, Title VII. Again, Your Honor, the Court was mixing with saying, well, was there employment. Title VII talks about employment. Section 1981 is not cabined by employment. The Supreme Court said it as clearly as possible in the *Humphries* case, the *Cracker Barrel v. Humphries* case, that it's much broader than employment. That was a sort of very quick decision on that issue.

So while we're dealing with an employment relationship here, that is not the cabin of a protective opposition under Section 1981 for the protected conduct.

THE COURT: I think I understand that issue and I think you can move on to another issue, but before you do, sort of on a related note, other than that tweet, is there any other protective activity that you

allege in the amended complaint on which you base your retaliation claim?

MR. CORDES: There were two, Your Honor.

One was the tweet, which predicated the discussion that happened the next day where she was told she was being taken off these various assignments that were part of her natural beat. In newspaper parlance, a beat is an assignment you normally cover. My beat is the courts. I cover the courts, for example.

In addition to that, Ms. Johnson complained that this taking her off this was based on two things. It was based on her race and based on the fact that she had opposed race discrimination. A fair reading of the complaint supports that.

Even defendant's argument, Your Honor, that, well, we also took off everybody who joined in Ms. Johnson's complaint, the defendants use that to argue, well, we punished white people but that's not the point, Your Honor. The point is that anybody that made that same complaint about racial bias and treatment and selective enforcement and like punishment was also precluded from this assignment.

The defendants say, well, they were white. I say so what. If I am a white person and complain about race discrimination and go into my employer and say you

were treating others, just to use a simple example, you were treating my African-American colleague in a racially discriminatory manner and I get fired about it, the fact I'm white is kind of irrelevant for purposes of whether the employer has violated the retaliation cases.

This Court recognized that in the Congerson (phonetic) matter, case, about a year or two ago. That's where the pleading on that is.

The second part, Your Honor, moving on, the adverse action. The problem is defendant says that there was no tangible adverse action, therefore, we didn't do anything wrong.

The problem is they have the wrong legal standard. The Supreme Court in the *Burlington Northern* case, cited in the materials, but it's 554 U.S. 53, outlines the standard when there is a retaliation claim, and a retaliation claim occurs when an employer takes what is called a materially adverse action. What's that? Well, the Supreme Court defines that. It is one that might persuade a reasonable worker from making a charge or supporting a charge of discrimination.

What the Supreme Court said is even more important is that standard is context driven, factual, and a jury question. I'm quoting from Pages 72, 73 of the opinion.

What do we have here? Well, what we have here is a reporter who was assigned to a beat, social media, and the coverage of which at the time, lots of the Black Lives Matter protest movement clearly in the summer of last year, seems like forever now, but it really wasn't, was occurring on social media; but the question is, Your Honor, so what. So you took her off a beat. Is that materially adverse? That's where the Supreme Court says it's context driven, which is why it's clearly not proper for dismissal as a matter of law under Rule 12(b)(6).

Who covers stories in the newspaper business matters. Your Honor, Joe Slump, the copyboy, is not covering the impeachment hearing of the former president. It is the best reporters that the media operation has. It makes or breaks careers as they often say.

I often refer back to the story where Dan Rather happened to be in Dallas on the day President Kennedy was killed, and his reporting of that story made his career and he is now a famous anchorman and the like.

In the context of the newspaper business, who covers the important stories matter and to take someone off of that, the factual jury question becomes in the

context of a newspaper is might that dissuade a reasonable reporter, who is at the beginning of her career by the way or very shortly or very close to the beginning of her career, from making or supporting a cause of discrimination.

If you tell a reporter that wants to advance her career that if you complain of race discrimination, you are going to be taken off the coverage of the White House beat or some such thing, that employee clearly is going to be dissuaded and that question becomes one that is factual on a jury question the Supreme Court said.

So looking at the right standard here, there was a material adverse action, Your Honor. Even the case where the Supreme Court decided that, the *Burlington Northern* case, the employee was reassigned, suspended and ultimately with no loss of pay, but the Supreme Court said there are actions, there are some jobs that are less glamorous, so to speak, and that is a factual question about whether that is materially adverse.

So, again, if we were on summary judgment here, Your Honor, or perhaps at trial, I could understand perhaps the argument of my colleagues that this might not be enough factually, but I think here for the pleading stages, I believe it clearly is. I believe

even beyond summary judgment, Your Honor, there is enough that it would dissuade a reasonable employee or reasonable reporter.

The defendants in their papers mention causation on a 12(b)(6) standard, Your Honor. I don't know how one pleads causation any clearer than to plead that the decisionmaker said that because you engaged in this conduct, the action I'm taking is causing it.

Under *the Bostock* decision, Your Honor, her complaint, Ms. Johnson's complaint about discrimination needs to be a but-for cause and what a but-for cause means is one of several. It doesn't have to be the sole one.

The Supreme Court said that the but-for standard applies in Section 1981 and in the *Bostock* case, it defined what but for means, and what but for means, events could have multiple causes of protected trait, not need be the primary reason, to be the "but-for" cause of the reason, and but for clearly does not have to be the sole cause and that is what the standard for Section 1981 needs to be.

Now *Bostock* was decided under Title VII but it wasn't decided under the motivating factor standard of Title VII which is a separate part of the statute. Justice Gorsuch talked about what but for means for

purposes of discrimination statutes and here we have as clear as can be in the *Comcast* case a month or two before *Bostock* where the Supreme Court said the but-for causation is the standard in 42 U.S. Code 1981.

Your Honor, the First Amendment issue, I think there are two things that the Court says about First Amendment issues in the context of employment matters and what I believe a synthesis of those cases are is that a media defendant cannot be told what to publish, but the courts that have addressed this issue have said who publishes is not what.

So, for example, I cannot tell the Post-Gazette -- not I but no one can tell the Post-Gazette write stories about Black Lives Matter, for example. That's not what we are here arguing at all, Your Honor.

What the Post-Gazette didn't say is we are not going to cover Black Lives Matter. What the Post-Gazette said is, you, Ms. Johnson, are not going to cover Black Lives Matter.

So the defendant's arguments only work if what they are arguing is that because of the First Amendment, because of what you claim is the essence of editorial judgment, we can decide that blacks cover certain stories and whites cover certain stories because

anything else is inconsistent. The Post-Gazette will deny this, I'm sure, they'll run through this, but it is inconsistent with what the courts have said.

What the courts have said in every situation where this has been addressed is that editorial judgment is the issue about what to publish. It's not the issue about who.

In the materials, the *Hausch* case is very close to this, Your Honor. The person who brought the suit was complaining that he wasn't made a managing editor or some promotion because of his race and the newspaper argued, well, no, the essence of editorial judgment is that we get to pick who our managers are.

The Court rejected that. They rejected it with very common sense, Your Honor. We are not saying -- we are not regulating content. We are saying who gets to make those decisions and the people that get to make those decisions cannot be appointed where race is a determinative factor.

That is all we're saying here, Your Honor. Constitutionally, we are not saying that the Post-Gazette had to do these stories. We are not saying that they had to do any or not do any stories.

What we are saying is if you are going to cover it and you are going to say that the only people

who will cover this are white, for example, or the only people who will cover this are people who have not expressed opposition to discrimination, then that is a violation of either Section -- well, 42 U.S. Code 1981 or perhaps down the road to Title VII, if this comes to this. That is a who question, Your Honor, and a who question is not content based unless the Post-Gazette is going to argue that our decision to only have whites do a certain kind of story is a content-based editorial decision.

I haven't heard the Post-Gazette say that. In fact, it has run from it in both its papers, in this case and the companion case.

So what are we arguing here then? The Post-Gazette either says that who we use to do this is an editorial decision or they have to admit that there is no limitation on a generally accepted law that says you cannot hire or dismiss or assign people based on their race.

That does not impact the First Amendment and the cases that talk about this, Your Honor, are all situations like the Tennessee case that my friend mentioned where it was a TV show and the race of the subject was a message that they were sending. The Tennessee court was pretty explicit on that.

I don't hear the Post-Gazette saying that the race of our reporters are a message we are sending. If the Post-Gazette wants to say that, by all means let's hear that. They have run from that.

So I think this constitutional argument they are making that Title VII and/or for the companion case or Section 1981 somehow is unconstitutional because it limits our editorial judgment, I think it's a red herring, Your Honor. Unless they are going to come forth and say the real reason they are doing it, but in this case, Your Honor, it does not. Who writes any of the news stories is not a matter of editorial judgment, although that is what the Post-Gazette says in their briefs.

There is no court that has said, and they are asking this Court to take the lead in this one, and say the decision of who writes our stories is protected by the First Amendment even in the face of an allegation of race discrimination. Your Honor, that's just not the law, nor do I think that the court of law will ever go.

THE COURT: All right. Thank you, Mr. Cordes.

Before I will allow Mr. Corn-Revere to get the last word, if there are any responses, but before that, one thing I guess somewhat unrelated to the motion to dismiss but what Mr. Corn-Revere raised was the fact

that Ms. Johnson has now gone on to greener pastures.

If this case proceeds, are there damages here that the plaintiff would be seeking? I don't know if there is going to be a difference in wages or what have you. As sort of a practical matter, I do worry, is this a great academic exercise but there is going to be no real claim here?

MR. CORDES: Your Honor, under the damages standards of both Section 1981 and the companion case that I will be talking about next, the statutes provide for both injunctive and declaratory relief, so there will be a damage claim made.

It's obviously the fact that Ms. Johnson left for another job was not totally unrelated to what happened here, and that's a fairly sophisticated damage argument, Your Honor, that I haven't made for about 20 years; but, again, it is actually compensable if the reason she left was because of the conduct.

I agree if she is making more money, and I believe she is right now, that will be an issue. Mitigation, obviously, is going to be an issue.

THE COURT: Okay. One other sort of practical question here. I think you had mentioned potentially the Title VII claim is being exhausted or is in the process of being run through the EEOC. Where do you

stand in that? Are we still a ways from that? My sense is I presume once that is exhausted, if this case remains, you would seek to add those claims to this case; is that right?

MR. CORDES: Your Honor, there is a claim that is filed on behalf of Ms. Johnson with the Pittsburgh Commission on Human Relations which is an EEOC derivative sort of. So at some point when that is exhausted, we will make that decision.

I assume if it's exhausted in this case in this proceeding, we would amend. The problem, of course, is their investigation is stayed right now.

THE COURT: I see. I wasn't sure of the interplay between the Pittsburgh Commission and the EEOC if there were sort of separate tracks.

The exhaustion of that claim would have to go through the Commission is basically what you are saying?

MR. CORDES: The EEOC, the Pennsylvania Relations Commission and the Pittsburgh Commission, they all have sort of a work-sharing agreement. So filing with one is tantamount to filing with the other. In fact, there doesn't need to be a filing. That's the other thing.

The Pittsburgh Commission brought the case initially without Ms. Johnson even requesting to and

that's sufficient to exhaust if they were investigating her claim even if she hadn't physically filed one.

We do have to exhaust. So that's why we are interested in what happens in the other case, obviously.

THE COURT: I see. That's helpful. I appreciate it. Thank you.

Mr. Corn-Revere, any further response?

MR. CORN-REVERE: Yes. Thank you, Your Honor. I will try not to take up too much of the Court's time.

What I'll try to do is focus on areas in which you asked questions and try to give our perspective on those.

I think your first question for Mr. Cordes was what is the most analogous case to this one in talking about whether or not there was retaliation and he talked about certain cases like I believe -- well, he actually talked about the capitol riots and so on and the *Cracker Barrel* case, but really the most analogous case is the one I mentioned earlier and is the controlling Third Circuit case of *Curay-Cramer v. Ursuline Academy*. That is a case where a teacher at a Catholic school signed an ad in supporting *Roe v. Wade* and where the argument was made complaining about society in general. She morphed this into a general complaint about sex discrimination at the school.

The Court rejected that saying there are no cases that have been decided saying that public protester expressions of belief are protected conduct for purposes of a retaliation claim.

At that point, Mr. Cordes mentioned his case, *Caplan v. L. Brands/Victoria's Secret*. That really does not provide support. It doesn't stand for the proposition that a general complaint will meet the test for Section 1981 retaliation. In fact, Mr. Cordes made the same argument in that case that he made here in the district court that posts intended to protest race discrimination in society and in general and both the district court and the Third Circuit held that the allegations didn't qualify under Section 1981.

Now, Mr. Cordes will tell you that the Third Circuit said the posts regarding Donald Sterling and the LA Lakers was, quote, arguably about that but there are two problems there.

One is unlike this case, that Facebook post did talk about employment discrimination and it was said mocking a racist employer, whereas here we have posts that talk about Kenny Chesney concerts and about how police treat protesters in general.

There is no link to employment and if anything is clearer from *Curay-Cramer*, it is the holding that

opposition to an illegal employment practice must identify the employer and the practice, none of which occurs here.

It was said to be arguable in the *Victoria's Secret* case but still wasn't enough to save the claim; and both the district court and the Third Circuit held that those claims were dismissed. As a matter of fact, it's not precedential but I think it does more to support our position than it does Ms. Johnson's. It's also worth noting that case is not precedential as we pointed out in our papers.

Again, I think there really is, as Your Honor asked, there really is no logical stopping point if any complaint about society in general can trigger protective activity under Section 1981's retaliation provisions. We never disputed the point that there can be retaliation claims under Section 1981. That's not in dispute.

The question is what constitutes protective activity and as a baseline minimum, there must be a complaint about employment practices, even if it doesn't name the specific employer. Otherwise, as your questions suggested, there would be no limiting principle whatsoever to what we constitute as protective activity.

As Your Honor asked, anything other than the tweet that would be considered protective activity, and there really was nothing other than saying she didn't like the fact that the Post-Gazette made the decision that it did. There is simply nothing here that qualifies for protective activity under Section 1981.

There was also essentially no adverse employment action. As I mentioned earlier, the sum total of the claim here comes down to the fact that on June 1st, Ms. Johnson pitched three story ideas that her editors declined.

In response to that, Mr. Cordes talks about how she was taken off her beat and those things can make or break careers.

One thing, there is no plausible allegation that she was taken off a beat. There is no such beat as covering riots. She continued to write stories on social media and there was no adverse actions in terms of position or demotion or her status for pay.

In terms of whether or not this could make or break her career, I think it's clear she was not barred from covering social justice issues in general. There is no allegation she was barred from covering social justice issues in general or Back Lives Matter.

In fact, this isn't in the record but I think

it's worth mentioning since Mr. Cordes was talking about how this has affected her career. In July, it was published in the Post-Gazette first a story talking about PSA features deaf community and inclusivity within the Black Lives Matter movement and that was published on July 29. That isn't mentioned in the papers, and on July 30, there was a controversy with the Port Authority about whether or not workers of the Port Authority could wear Black Lives Matter face masks. That, I think, ended up in a case before Your Honor that was decided last month.

So, in terms of covering important social justice issues, Ms. Johnson was able to continue to do that.

Now, admittedly, these two stories aren't in the record because they weren't mentioned in the papers but they were published in the Post-Gazette so they are matters for which the Court can take judicial notice, and the fact is there are no allegations in the complaint about how this has affected her career.

There was an exchange on that later talking about the fact she has gone onto greener pastures. She has been able to go onto greener pastures because of this case, she has exploited this case to go onto greener pastures. So the movement to Vice News, which

Mr. Cordes acknowledges is for higher pay, was the subject of a front page Temple University story on the web page for the Klein College of Media and Communication on January 20, 2021.

The allegations simply aren't in the complaint that there has been any kind of -- oh, there was one other point I wanted to make about the *Caplan* case. Sorry for the disjointed nature of this but it just occurred to me as I was talking about this.

The fact that in the *Caplan* case even for the aside of the Facebook post in that case, one of which could arguably be construed as relating to a race relationship to an employer, the Court said her dismissal was determined anyway because she had also posted things on Facebook that justify her termination.

This I think speaks to the argument that Mr. Cordes was attempting to make about *Bostok* and whether or not the but-for cause or motivating factor cause can apply here because if there was a separate reason that justified the termination in the *Caplan* case, the same is true here where you have a violation of the social media policy as being a justification. I just wanted to make sure I covered that before moving on.

Finally, I don't want to take too much of your

time on this but I do want to address a couple points about the First Amendment issue.

To hear Mr. Cordes tell it, this is only a question of whether or not the Post-Gazette is being told what stories to publish.

We've never maintained that. This is a matter of interference with editorial standards.

Again, it's hard to talk about this without noting the extent to which what's really at stake continues to be changed in the retelling of what's going on here. As I mentioned and mentioned several times, this is all about whether or not the Post-Gazette was willing to accept story pitches on one day and whether or not all reporters were treated the same way.

Mr. Cordes said it's whether or not the Post-Gazette has a First Amendment right to assign black reporters to one story and white reporters to another. Again, that's not the issue. The question is whether or not the Post-Gazette can apply its editorial policy to all reporters, and in this case, that's exactly what happened.

Ms. Johnson took a public position on a public controversy and the Post-Gazette applied its policy and said that she couldn't cover the three stories she pitched. Others at the Post-Gazette who also reposted

her tweet, the same policy was applied to them. It isn't a question of whether or not there is one set of stories for one race of reporters and another set of stories for another race of reporters. It's really a question of whether or not we can apply editorial standards. All of the cases we have cited say there is a First Amendment ability to impose and enforce those kind of editorial standards.

The case on which Mr. Cordes relies chiefly, a 1937 case, *Associated Press v. NLRB* went on to say even though it said that general labor law does apply to newspapers, which, again, we don't dispute, but it goes on to say, nothing in this ruling circumscribes full freedom and liberty of the petitioner to publish the news as it desires and to enforce policy of its own choosing with respect to the editing and rewriting of news for publication and the petitioner is free at any time to discharge any editorial employee who fails to comply with the policies it may adopt.

All of the other labor cases that we talked about, *Newspaper Guild of Greater Philadelphia v. NLRB*, *McClatchy Newspapers v. Nelson*, *Ampersand Publishing*, all of them affirm the ability to have those kinds of editorial standards to preserve journalistic ethics and the First Amendment protects them in spite of the

application of more general laws.

The one case that they rely on, a 1983 case from the District of Nevada, *Hausch v. Donrey*, doesn't dispute that. That case only dealt with whether or not newspapers were completely immune from any kind of regulation under Title VII and that's not what is at issue here.

What is at issue here is whether or not on the day that Ms. Johnson pitched three story ideas the Pittsburgh Post-Gazette had the First Amendment right to decide that it would apply equally to all of its staff members the same editorial standards.

Thank you, Your Honor.

THE COURT: All right. Thank you to both of you. Very well argued motion with several I think very interesting issues.

Let's move on to the next motion, but before we do that, why don't we take a short break here. It's about 11:30, why don't we just take about five minutes, let's say 11:35 come back on the record and then we'll hear from Mr. Kerr on the defendant's motion to dismiss in the other case. Let's go off the record at this point in time.

(Whereupon, a break was taken.)

THE COURT: Why don't we go back on the record

at this point in time.

Let's move on to the second motion to dismiss. This one in the Pittsburgh Commission Human Relations case.

Mr. Kerr, do you want to proceed.

MR. KERR: Good morning, Your Honor.

I think we had about a half dozen initial case management conferences by phone but I think this is the first time I appeared in front of you. It is nice to see your face rather than talk on the phone.

THE COURT: Same here. Good to finally see you in person.

MR. KERR: May it please the Court, Mr. Revere, I won't go over all the points in my two briefs. Instead, I will focus on a few issues which I think are particularly significant but, first, I would like to start my argument with a 30,000 foot view so to speak.

The Post-Gazette seeks to enjoin an ongoing administrative proceeding by the Civil Rights Commission. I've handled employment law cases in one form or another for about 30 years, so when my partner, Mr. Hark Hamilton, who is the Commission solicitor, asked me to help him on this case, the first thing I told him was I never encountered a case where a litigant

tried to stop an administrative investigation, so there's probably a reason why I haven't run into that issue.

Before I started to do some legal research, I tried to figure out from a common sense viewpoint why this is the first time I have bumped into this.

As the Court knows, the largest Civil Rights Commission in the country is the EEOC. Its website says it investigates about seventy to a hundred thousand charges of discrimination per year. So when I started to do legal research, I looked for a cases where a judge had enjoyed the EEOC from investigating a charge because the employer felt like it had a winning defense so there would be no need for the investigation.

At first I couldn't find any cases. I didn't even find cases where employers had tried. Then I looked for cases where an employer filed a suit against the state or local equivalent of the EEOC, even though the EEOC and the state commissions do the same thing. That's when I came across the *Ohio Civil Rights Commission v. Dayton Christian School* case, and I'll just refer to that as the *Dayton* case. It seemed the underlying logic of *Dayton* is pretty straightforward. There is already a system in place to investigate discrimination charges, okay. In the *Dayton* case, it

was the Ohio Civil Rights Commission which would be the equivalent of the PHRC here in Pennsylvania, but it could have been the EEOC. Under the Younger abstention doctrine, federal courts are supposed to allow the EEOC or its brethren state agencies to do their jobs, to investigate cases.

After the administrative remedies are exhausted and if the suit is ever filed, then the federal courts decide the employer's legal defenses.

As this Court knows, employers routinely file motions to dismiss and motions for summary judgment because they always feel they have winning arguments. I know I do about 50 percent employment defense and every time I defend a case, I think I have a winning argument and usually the Court says, well, reassert it on summary judgment. It's not as good as you think, Kerr.

Sometimes defense counsel wins, but they don't sue to enjoin the EEOC or the PHRC because the administrative charges are still at the administrative stage.

So it started to occur to me in effect the Post-Gazette is seeking 12(b) relief at the administrative remedy stage, albeit using the old saying the best defense is a good offense.

If that's permissible in employment

discrimination cases, there should be thousands of reported cases where employers filed preemptive federal 1983 injunctions against the EEOC or the state agencies because, as I said, every employer defense counsel thinks they have a guaranteed winning defense. I think the *Dayton* case effectively shut that down many years ago. I think the Supreme Court's rationale was in large part a practical one because it didn't want to open up a Pandora's box that would allow employer defense counsel to basically make Civil Rights Commissions moot.

In my first brief at Pages 5, 6, and 7, I listed several cases where the federal courts have abstained from enjoining civil rights investigations. So I think it's fair to say that that is the majority view by far.

I understand this Court is sort of a hot bench on the abstention doctrine because it recently applied it in a couple cases, so I'm not going to lecture the Court on what the elements are.

THE COURT: I will say it's amazing how many abstention cases I get. I don't know if I'm in the minority.

MR. KERR: There's tons of them, Your Honor, tons of them. The Commission's argument in this case, no surprise. It's just a straightforward eighth grade

civics lesson federalism defense, period.

State courts are supposed to enjoy the same prestige and standing as federal courts. Though there are some unusual instances where a federal court should enjoin a state court and though a federal court's duty is to hear cases as the Supreme Court said is, quote, unflagging, when the elements of the abstention doctrine are met, federal court are supposed to defer to their state court brethren.

The two most significant cases my client, the Commission, relies on are the *Dayton Christian School* case and the Third Circuit unreported case in *Ocean Grove Camp Meeting Association v. Vespa-Papaleo*, and I just call that *Ocean Grove*.

Getting back to the *Dayton* case that was originally significant and is still significant because, as the Court knows, it extended Younger to quasi-criminal proceedings. As the Court knows Younger was originally a criminal case where defense counsel made a preemptive strike against the prosecutor and then in subsequent cases like *Dayton*, the Supreme Court said, well, if it's quasi-criminal under these factors or whatever, we are going to extend it. The civil cases, too.

But in the *Dayton* case, the Court was faced

with facts very similar to the case we're dealing with today where plaintiff filed a 1983 complaint alleging violations of her First Amendment rights. As I said in my brief, *Dayton* is particularly applicable because that's what the Post-Gazette is trying to do here.

I'm never overly confident about any case but to be frank, it's always nice to start your case off when you have a United States Supreme Court opinion that is pretty close on its facts. It's a good way to start.

Then years later in the *Ocean Grove* case decided in 2009, the Third Circuit summarized the often cited elements of the Younger abstention doctrine as updated later in the *Middlesex* case, and I said I wasn't going to lecture the Court, but I just want to go over this quote from *Ocean Grove* because it concisely lists the elements and then I'm just going to hit a couple of the elements that I think are particularly relevant.

In *Ocean Grove*, the Court said, quote, Younger abstention is appropriate when, one, there's a pending state proceeding judicial in nature; two, the proceeding implicates important state interests; and three, there's an adequate opportunity in the state proceedings for the plaintiff to raise its constitutional challenges, and then the Court cites *Middlesex*. That updated Younger.

Then the *Ocean Grove* Court goes on to say,

When all three of these factors are met, abstention is proper unless -- these are the two exceptions -- one, the state proceedings are being undertaken in bad faith or for purposes of harassment; or two, some other extraordinary circumstances exist such as proceedings pursuant to a flagrantly unconstitutional statute such that deference to the state proceeding will present significant immediate potential for irreparable harm to the federal interest asserted. Okay.

Obviously, in this case, Your Honor, the Commission believes that all three of the elements of Younger, Middlesex are met and neither of the two exceptions are met. So I'm going to focus on a couple of these elements that I think bear a closer scrutiny today.

No. 1, is there a pending state proceeding that is judicial in nature? We believe that the first element has been met because there is a pending state proceeding that is judicial in nature.

In their brief, the Post-Gazette asserts that because the only apparent docket activity before the Commission is a complaint, a formal complaint that was filed and served and then the Post-Gazette filed a verified answer in new matter and also filed a position statement, but at that point then the suit was filed.

Now whether or not that's a judicial proceeding, I don't mean to be frivolous, but one only has to use the duck test to determine there's an ongoing judicial proceeding. The Commission's complaint is procedurally identical to a complaint filed before the Pennsylvania Human Relations Commission, which is its statutory equivalent.

Moreover, the Post-Gazette's verified answer in new matter is obviously a responsive pleading in a judicial proceeding. In fact, the authority that the Post-Gazette relied on when it filed its answer in new matter is Rule No. 4 of the Commission's Rules of Civil Procedure which provides for an answer to be filed within 30 days and also allows for a position statement.

That same Rule of Civil Procedure, No. 4, provides for amendments to pleading, motions and briefs. So if you just use the duck test, there's a judicial proceeding going on. I'll address later how the Post-Gazette tries to analogize this to a case that said it's just an audit letter, that's not enough to be a judicial proceeding.

You don't put a caption on the top of an audit letter, you don't file an answer in new matter verified by the defendant in an audit letter. So, again, using the duck test, I don't really think that is that much of

a question here.

Now the Post-Gazette specifically tries to distinguish this first element away by arguing that since the Commission's procedures in two phases, first, investigative phase, where we're at, and then in the adjudicative phase after a formal finding of probable cause, the Post-Gazette is saying, well, because we are not at the adjudicative phase yet, a judicial proceeding hasn't begun, but this specific issue was addressed in great detail in the *Ocean Grove* case where the administrative proceeding was the exact same. It was in the same two phases. The Court held that from the minute the complaint is filed, the entire process is judicial in nature. I know it's never exciting when quotations are read but I think I'm going to read from *Ocean Grove* and it pretty much nails this down.

The Association argues that the first requirement of Younger is not met because the early stage of the DCR proceedings are investigative, not adjudicative and, therefore, do not amount to proceedings that are judicial in nature. The Association notes that the administrative process at issue in this case is divided into two stages. An investigatory period after which the DCR makes a probable cause finding and an adjudicatory period during

which a hearing is conducted before the administrative law judge.

The Association contends that the administrative process is not, quote, judicial in nature under Younger until a probable cause finding is made and the case is transferred to the judge.

Here, conversely, the Association notes that at the time the federal suit was filed, the DCR had not even begun its investigation. The Association does attempt to distinguish this case from the Ohio Civil Rights Commission, that's the *Dayton* case, in which the agency had made a finding of probable cause prior to the filing of the federal court action, and there's a cite to *Dayton*.

Because we conclude that the DCR proceedings are judicial in nature from the point that a complaint is filed, we reject the Association's argument under Younger's first requirement.

Then the Court goes on to talk about the system that's laid, the administrative procedure system laid out in the *Ocean Grove* case. It's standard administrative law. It's almost identical to the same administrative procedure in the Pittsburgh Commission's Rules of Civil Procedure.

Then the Court concludes its holding on this

aspect by saying, Considering this elaborate statutory scheme for addressing civil rights complaints, we must agree with the district court that there simply can be no question that the DCR proceeding as a whole is judicial in nature. The Supreme Court has recognized that Younger abstention applies to proceedings conducted by civil rights agencies, cites *Dayton*, and that administrative proceedings can be judicial in nature from the moment a complaint is filed.

Significantly, the Third Circuit cites *Middlesex* for that proposition. Now I'll come back to *Middlesex* in a second.

Just to conclude the quote from *Ocean Grove*, the Court says, the DCR proceeding in this case is very similar to proceedings in Ohio Civil Rights Commission and in Middlesex County Ethics Committee and is judicial in nature from its inception. Notably, when a complaint is filed with the DCR, the agency launches a prompt investigation that is akin to the discovery period of federal court and if at the end of the investigation the DCR finds probable cause, a trial-like hearing is held. We conclude that this entire process is judicial in nature and prong one of Younger is met.

Now in the Post-Gazette brief they are obviously concerned about this opinion and so they

distinguish it and I'm not making light of them. I would have done the same thing. They try to distinguish it by saying, well, *Ocean Grove* is an unreported case, and I get that, but *Ocean Grove* is very persuasive. It's been cited I think 20 or 30 times not only by Third Circuit Courts but by courts and other jurisdictions; and significantly, it's never been distinguished or criticized but, again, it cites *Middlesex*.

In *Middlesex*, that was a case where an attorney committed an ethics violation allegedly. The Ethics Committee filed a complaint, an ethics complaint, and the system looked pretty much similar to the Pennsylvania Disciplinary Board. Instead of answering the complaint, the plaintiff Middlesex filed a 1983 injunction alleging violation of the First Amendment rights. It was an attorney who had said some very unflattering things about a judge that he was trying a case in front of, and the Ethics Committee said you are not supposed to criticize a standing judge and so they brought him up on charges. The attorney defended saying, no, that's a violation of my First Amendment rights. I'm allowed to criticize the judge if I want to.

In the *Middlesex* case, the Court said that the judicial proceedings started upon the filing of the

ethics complaint. So I am making a big deal out of *Middlesex* even if this Court does not give full weight to *Ocean Grove* because it's an unreported case, if you trace back its source, it goes back to *Middlesex* which is a Supreme Court case.

Last on this topic, I will also point out a federal judge in West Virginia in 2019 drilled down on this same question. I didn't cite this in my brief. I apologize. I didn't find this case until yesterday. I did the last minute Shepardizing of the cases I cited just to see if there was new cases and that's the first time I came across this one. It's called *Durstein*, D-u-r-s-t-e-i-n, and the Westlaw cite is 2019 Westlaw 6833858.

In *Durstein*, it involved a high school teacher who had tweeted some, for lack of a better term, Islamic phobic tweets on her Twitter account and she posted a meme picture of President Obama calling him a, quote, Muslim douchebag. So the school sent her some charges and said we are going to investigate you. She filed a 1983 claim and her lawyer made the same argument that the Post-Gazette is making that since this is a pre-probable cause situation, Younger doesn't trigger.

So, significantly, the West Virginia court thought that the *Ocean Grove* case from the Third Circuit

was so persuasive it cited that. Again, I'll read this quote and I'll be done with this issue. Last quote I'll bore you with, Judge.

Quote: Even if the hearing is judicial in nature, Durstein argues abstention is inappropriate because the Department of Education is not called a hearing. The agency is only investigating whether to hold one. Durstein relies on two Fourth Circuit cases but neither are instructive here. I'll skip over the distinguishing of the Fourth Circuit case.

But in contrast, the Department of Education made it clear that its investigation will decide whether a hearing is warranted and the Department has provided Durstein with the contact information of her investigator to stay informed. To split the Department's process into two separate investigative and adjudicative proceedings, as Durstein argues, would effectively eliminate Younger by allowing plaintiffs to file in federal court as soon as an investigation is announced. The court, therefore, concludes that the Department's investigation and hearings are two phases of the same proceeding, and that's why I'm quoting this. Conceptually it makes sense.

Then the Court cites *Ocean Grove* and it cites another case, which I apologize, I didn't find, pretty

much holding the same thing. It's a reported Sixth Circuit opinion from 2008. It's called *O'Neill*, and that's at 511 F.3d. 638 that's reported Sixth Circuit case. The parenthetical comment says, quote, holding that filing and investigation of grievance is part of the state's judicial proceeding.

So with regard to the first prong, I don't really think it's a close question. I hope I haven't beaten it to death but, again, if you just go back to the duck case, look at the caption of the complaint, look at the answer in new matter, we are in a judicial proceeding. So I kind of think, to use an old lawyer's phrase, it's beyond catapulted. The first prong of Younger is met.

To get back on track here. Last, I'll point out although we're still at the complaint phase, this is a special complaint, Your Honor. Most complaints, as the Court knows, whether it's in front of the EEOC or the PHRC or City Discrimination Commission is initiated by a private complaint; but just like the EEOC can bring, for lack of a better term, a class action, okay, the PHRC and the Pittsburgh Commission can do the same thing and there's a special rule for that in the Pittsburgh Commission's Rules of Civil Procedure. So that's what was followed here. There were no names

mentioned. It's kind of a mini class action, but there is a rule of procedure that authorizes that.

My point is if you read the rule, and I cited this in my brief, before a Commission complaint is filed, the investigative committee has to do a vetting process. In other words, it's not like an EEOC charge where anybody can just walk in and say I want to file a charge, there may be zero merit to it, there was no vetting. You go in there and tell the EEOC you want to file a charge, they'll let you file a charge and then they'll figure if there is no merit, it will be vetted through the system.

Is it officially beyond the probable cause stage, no, but it kind of is because it was already vetted.

Now, another way PG attempts to distinguish that is with the recent Third Circuit case *PDX North v. New Jersey Department of Labor.* That's mentioned in their brief. Full disclosure. At the time the PG cited that, it wasn't reported. It is since a reported case. There is a Third Circuit case, so it's precedent but I'm not concerned about it because it's easily distinguishable on its facts.

There were two plaintiffs. PDX wasn't one of them. The other one I think the initials were SLS, and

that's the one that got out on the Younger prong. Their winning argument was, well, the only, quote, complaint they got was an audit letter. They got an audit letter from the agency saying they did some predatory lending and whatever, and the SLS lawyer said, well, we don't think you are in a judicial proceeding yet because it's just an audit letter, and the Third Circuit agreed. Well, that makes sense.

That's a far cry -- a simple audit letter is a far cry from a formal complaint. I understand why the Post-Gazette cited that, but factually, I don't really think that carries much weight.

The only case that I found where a court did enjoin a discrimination investigation and the Post-Gazette cited this in their brief is a case called *LA Debating*. It's a Fifth Circuit case from 1995. I think that's the only time, at least that I found, that a court enjoined a discrimination commission but that case is easily distinguished from the facts in this case.

The defendant in this case was the City of New Orleans and if you read the opinion, the City never even raised this argument. The Court raised it on its own and kind of hinted the City's lawyers weren't too smart. They should have said, hey, first prong of Younger isn't

met.

The Court gave that quite a bit of weight, even though, as the Court knows, you can raise abstention sua sponte, the Court gave it a lot of weight because the Court said, well, we'll take this into consideration. They didn't think it was that important.

Secondly, the City of New Orleans for some reason waited five months before it ever raised abstention and during that five months, did zero on the investigation. That's another factor that the Fifth Circuit took into consideration when they decided to enjoin the Commission.

Well, obviously that didn't happen in the Pittsburgh Commission's case because as soon as the complaint was filed, we immediately filed a motion to dismiss asserting the abstention doctrine and even though we haven't done an investigation, as I said in my brief, when defense counsel and I talked about that and they made that request to hold things off until this Court made its decision, I said, okay, let me talk to my client. I'll recommend just out of comity we'll do that but I don't want you to turn around to use that again because I had already found the *LA Debating* case and I didn't want to shoot myself in the foot.

So defense counsel entered that stipulation

and when we had the initial case management conference before this Court, and I know you had a lot of them, Judge, and you probably don't remember, but I do, I brought that up again and I said, hey, Judge, I just want you to know we entered into a stipulation but I don't want you to hold that against me. I don't know if we were on the record or whatever, but I think you said sure, no problem. Okay.

There are other ways to distinguish *LA Debating*, a low hanging fruit way of distinguishing it. You can say, well, it's an old case, it's 1995, and it's in direct contravention to *Ocean Grove* and *Durstein* and arguably, I think it's in direct contravention to *Middlesex* so it probably shouldn't have been decided that way anyway.

So as far as whether or not there is an ongoing proceeding to get to first base under Younger, I think clearly we are there.

The second prong I would like to talk about is whether the proceeding implicates important state interests. Well, the *Dayton* case specifically held that generically investigating a civil rights complaint implicates important state interests period.

So in some of the Younger cases, the Court looks at whether or not the interest being implicated is

big enough of a deal to trigger abstention. Well, that was decided a long time ago by *Dayton*.

The Post-Gazette I think in their briefs attempt to distinguish this by recasting the Commission's investigation. They're saying, well, there is not an important state interest because we have a winning defense because there was no tangible employment action, et cetera, et cetera. I think that's a distinction without a difference but I would like to address that.

Where my client's case is different from Mr. Cordes' case is we're not looking for a decision on the merits of the Commission's complaint. As I said at the beginning of my argument, I think what the Commission is doing is they are trying to attack the merits of the complaint. They are effectively making a 12(b) motion.

We don't know how the investigation is going to come out, Your Honor. Post-Gazette raises very interesting First Amendment issues. They may prevail. They may convince the Commission we are going to back off. Talk about -- I think Mr. Corn-Revere asked the Court to take judicial notice of what is on the Internet. Well, if you look at the EEOC's website, it says that nationwide, 97 percent of all the EEOC charges

end with no decision and the Court has seen this. The EEOC just sends out the standard letter that says we are concluding the investigation with no decision and here is 90 days.

If you look at statistics of the PHRC or the Pittsburgh Commission, that's the usual trajectory.

So what PG wants to do, they want to litigate the merits now. I don't know, maybe this case will turn out where the Post-Gazette or the Commission will say, well, we are going to do what the EEOC and the PHRC does. We are not going to come up with any decision. If you want to appeal this and go to court or whatever, you can do that, but that's generally the trajectory; but even if probable cause is found, okay, the Post-Gazette has all of its First Amendment rights.

So, again, I don't think it's the proper analysis to address the same substantive First Amendment rights that the Post-Gazette is making in Mr. Cordes' case and apply that here because all we are doing is we are just looking at the procedure. Again, I don't know. Maybe the Post-Gazette will convince the Commission that there is no case. They have already submitted I think a 126-page position statement and made some very, very interesting arguments, but before the Commission could get around to deciding whether those arguments held

water or whatever, we were hit with this lawsuit.

So, again, I start off with the practical argument, every defense counsel is going to want -- an employment defense counsel is going to want the dream scenario of killing the EEOC charge or the PHRC charge or what's the Latin phrase, ab ovo. Well, if we are going to go down that road, all the Commissions are going to become moot. We are just going to move that 12(b) litigation down to the Commission and that's not what the systems are designed to do.

I'm not sidestepping the First Amendment arguments. I can meet them substantively but I just don't think that's the proper analysis.

THE COURT: Let me ask you this. I don't know if it bears on prong two or three, it might touch on both of them, but as I understand the Post-Gazette's argument, it's almost like I guess a subject matter jurisdiction type of argument that I would equate it to, which is that by simply initiating this investigation, you're violating the Post-Gazette's First Amendment rights so, therefore, by going through with this proceeding, they have already lost some of the immunity to which they are entitled.

I guess it fits more maybe the third prong here, and, therefore, they are not going to have an

adequate opportunity to really raise their First Amendment argument. They lost it because they lost it at the outset.

I guess I'm jumping ahead maybe to the third prong more than the second but I think they tie together a little bit in that respect.

MR. KERR: They do. Your Honor, I got a short answer for that and then I got a long answer. I'll give you the short answer for that first. The short answer is the courts have already addressed that. I'll read from again *Ocean Grove*. Before I do, let me point out what they're complaining about is the First Amendment and so this is an abstention case subset First Amendment. The *Ocean Grove* case wrote, and I'll read a very short paragraph. It said:

First, the DCR's exercise of its statutory mandate to investigate discrimination cases cannot be construed as bad faith and the Association has not demonstrated the DCR has conducted itself in a manner that shows any disrespect or disregard for federal laws. Similarly, the Association did not establish the existence of extraordinary circumstances.

I know that kind of jumped the gun, too, because that's one of the exceptions, and I'll address that, but this quote is all sandwiched together.

This exception does not apply any time there is a chilling effect on the claimant's exercise of constitutional rights. Significantly, it cites Younger. Here is a famous quote from Younger that pops up I think it was about 50 times yesterday in different cases. Again, abstention subset First Amendment defense. Quote from Younger: The existence of a chilling effect even in the area of First Amendment rights has never been considered a sufficient basis in and of itself from prohibiting state action.

Okay. So it seems a rather monolithic analysis but every time this question comes up when somebody is in the same position as the Post-Gazette and they are filing a 1983 case and they are trying to enjoin an underlying investigation, whether it's by a Civil Rights Commission or a lot of these cases come up in Children Youth Service Commission, I think two times Younger comes up more frequently is either a criminal case or a CYS case, but if what they are complaining about, and I don't want to say just First Amendment rights because I think the First Amendment is pretty important, but if they are complaining about First Amendment rights, you always see this Younger quote.

So it seems like Younger and the cases that followed this have adopted a pretty rigid rule. That

seems kind of harsh. What are some of the exceptional circumstances because obviously, you have that exception and I think in the Post-Gazette's brief they mentioned a case, it's like their last defense. They are saying, well, all right, if the Commission can establish all these Younger exceptions or these Younger criteria, we'll use and I'll call it the exceptional circumstances case.

Judge, if you look at all those, they either involve facts where the plaintiff is in jail, you can't unring a bell if you have been sitting in jail for a long time, or life and limb, physical life and limb are at stake.

There are a couple cases. There is a case that the Post-Gazette didn't cite. I thought I would see it in their brief. It's called *Addiction Specialists* where a plaintiff won on that on extraordinary circumstances, call it irreparable harm, whatever.

That case involved a denial of a permit to keep a rehab clinic open. So the court said people could die. If we shut this clinic down, you can't unring death.

So where the cases seem to line up, if you're saying like the Post-Gazette just going through this is

going to violate my rights, even if I win, it's too late. My rights will be violated. If it's First Amendment, the Court has already decided that.

Again, the Court -- Younger and the federal courts aren't saying the First Amendment rights aren't important. What they are saying is you want to complain about First Amendment, fine, you may win on the First Amendment issue but you got to do that in state court under federalism. We'll give you an exception to do that if time is ticking away and you may die before you litigate that in state court or you may sit in jail.

Again, I'm not trying to make that simplistic or monolithic but that language keeps coming up again and again. If you look at that string cite I have on Pages 5 and 7 about all the times where other plaintiffs have done the same thing as the Post-Gazette, they tried to shoot down a discrimination investigation asserting the First Amendment, you see that language all the time.

The only case I could find where somebody was successful in doing that was the *LA Debating* case and I already distinguished that.

Tied into that is the question of will they get meaningful due process. Your Honor, I'm representing a government entity and you dealt with the government before. They're interested in maintaining

the integrity of their system. They'll go to court because they believe in their rules and regulations, they believe in their system, they believe they have a fair system. That's what we're doing there.

We're saying just because we are a state court, we're not a federal court, just because we are a state court system, we have a good system. You may get the relief that you want but you shouldn't condescend us and just assume because we are a state court we are not going to be able to adjudicate questions like the First Amendment.

This dovetails into the Post-Gazette's other argument where they are saying our system cannot fully vindicate First Amendment rights. Well, let's go back to *Middlesex*.

In *Middlesex*, the attorney made that same argument. The attorney said, well, I have good complicated First Amendment issues here. You are saying I can't stand on the street corner and bad mouth the judge, whatever, I think it's appropriate to defend my client, that's very, very important.

If I'm going to go in front of an ethics committee, that's not a real judge. Those are not real judges. They are not going to understand these esoteric First Amendment arguments and the Supreme Court said no.

Let's look at your system. You are going to go in front of a board. A lot of the people on the board are attorneys. Do not presume that they cannot understand constitutional issues. You can make those defenses. You may win before the Ethics Committee. If you don't, then you get into the court system and appeal that.

That's one of the defenses the Post-Gazette asserted in their brief. They are saying, well, we can't meaningfully assert our First Amendment editorial discretion defenses in front of the Pittsburgh Commission. Well, let's look at the actual system. If you look at the rules of procedure, here is how it would work out.

I'm into the last section of my second brief where I said, okay, let's put the case law aside and let's just look at the nuts and bolts, let's look at how this would play out if the Court denied the request for an injunction and we went to court.

The Post-Gazette has a ton of due process rights off the bat. If the investigator wanted to ask the Post-Gazette a question that they felt it was out of bounds because it infringed on the editorial expression, the first option the paper has is to say, I don't want to answer that. I think that's First Amendment. We're not going to answer. Then the ball bounces back to the

Commission. What's the Commission going to do? The Commission may say, okay, I'm not going to push the issue. I have seen enough. We are just going to go ahead and dismiss the case or we'll make a decision but I'm not going to push the issue.

So it may be a moot point or let's just say the investigator said you know what, you are using editorial discretion as a defense not to answer the question. I think I need that. The investigator could ask for a motions commissioner to be appointed by the committee. A Motions commissioner would be the equivalent of an administrative law judge at that stage. Then the Post-Gazette could make all the arguments. They could say, well, here is the 127-page position statement we read and this is why we don't think we need to answer that question. The Post-Gazette may win and they could win very easily. The motion commissioner could say yes, that's protected information. You don't have to answer that and then the investigator would have to make the decision.

The Post-Gazette would have another chance of asserting their First Amendment defense at the public hearing. They could make that same motion and they may win there or if it gets appealed to a Common Pleas Court, a Common Pleas judge in Pennsylvania can decide

the same First Amendment case law that a federal court could do; but for the Commission to just say we don't even want you to ask the question, our First Amendment right is so sacrosanct, we don't want the hassle of even asking the question.

I understand why you didn't want to say that, but that gets you right back into Younger where Younger says if your reason for getting out of abstention is the First Amendment, that never has been a basis alone. Nobody is dying, nobody is in jail.

It seems like I'm being inconsistent. It seems like I'm poo-pooing the significance of the First Amendment. No. The First Amendment is a very important amendment and I respect the rights of the newspaper but that's not enough to get you out of the abstention doctrine. All that does is you get that question moved to the state courts.

Let me talk about moving forward. I don't know how the Court is going to rule but if you rule in our favor, we are asking you to dismiss the case; and as you probably know, if you grant our abstention motion, it's dismissed without prejudice. The Court also has discretion to stay the litigation.

Now, how would that actually work out? Well, if you granted our motion and you abstained, I don't

think you'll ever see this case again, Judge, and here is why. No. 1, I think there's a great chance that this is going to be resolved. The First Amendment issue is going to be resolved either at the Commission level or the Common Pleas level.

No. 2, the Commission may decide you know what, there is no case here. I heard Mr. Corn-Revere make very interesting arguments about there is no material adverse action or whatever. He may prevail at that, the Commission. The Commission may look at that and say you know what, we just don't think there is anything there. So the First Amendment rights aren't even ripe. They won at the merits but at the Commission level, not in federal court.

Let's just say for whatever reason, this goes to Common Pleas Court and then it gets appealed to the appellate court. The Post-Gazette's First Amendment defenses will be adjudicated, and you know what, Judge, there will be collateral estoppel.

If you read the line of cases of abstention and 1983 moving forward, they almost never come back to federal court because somebody is going to win that First Amendment issue, either the Commission is going to win or the Post-Gazette is going to win, and they're going to know that's collateral estoppel. So the cases

either are going to go away or be settled because even though it's in state court, the Court knows that collateral estoppel will apply in federal court. So that's the normal trajectory. That's why you don't see these cases -- if you read the cases, you don't see them coming back to federal court because the decision is made and that decision is binding. You know what, the Post-Gazette may win. They may win the First Amendment issues if things don't get worked out early on and it goes down the line. They may win or they may lose.

If they lose, they are not going to go back to federal court because they know the Post-Gazette would use collateral estoppel. If they win, the Commission is going to be faced with that collateral estoppel. My point is it gets worked out.

I understand they don't even want to be bothered by the investigation at all. They don't want to answer any questions. You know what, Judge, every single employer that receives a charge of discrimination from the EEOC or the PHRC or Pittsburgh Commission, they feel the same. You know what, we shouldn't even have to be defending this. This is going to be a distraction. Why should we have to pay our lawyers. So to that extent, the Commission is making the same argument that every other employer makes. The only difference is they

are using a different type of defense but, again, this takes us back to Younger. It says if the only thing you are going to assert is the First Amendment, that's not the type of defense that gets you out of Younger. You may win on that in state court but we are not going to let you out of the abstention doctrine because nobody is dying and nobody is in jail.

That's all I have, Your Honor.

THE COURT: I have one question, maybe a bad question because I don't know yet if it's relevant at all before the motion before me. The complaint by the Commission seems broader than the potential First Amendment defense that the Post-Gazette would raise. I think it's not so much -- it doesn't go only to -- I could be wrong, but I think this is how I read the complaint. It doesn't go only to the Post-Gazette's exercise of its editorial judgment with respect to Ms. Johnson and her tweet but it also alleges that a number of other Post-Gazette employees were retaliated against for their support of Ms. Johnson, something which I think is maybe -- maybe the Post-Gazette would argue that, too, is protected, but under the First Amendment, but at first glance, it seemed to be potentially outside of that First Amendment argument.

So assume that is the case and it's outside of

a maybe First Amendment defense, I'm just trying to think does that matter? Is it relevant here for purposes of Younger? It may not be but it's something that aided me a little bit.

MR. KERR: I don't think it changes the Younger analysis at all, Your Honor. I have the complaint in front of me but from a practical standpoint, it's very relevant because that's what got the Commission fired up.

They looked at this as basically witness intimidation. When I spoke with the director, this is not on the record but it will come out in discovery, I said you seem to be saying that the Post-Gazette had sort of this mass retaliation against everybody that stuck up for Ms. Johnson. How many reporters are we talking about. I thought they were going to say four or five and they said 60. I went, oh, that's a lot.

I don't see a lot of class action-type complaints. Not to be reductive, but the Commission thought this was a really big deal and that's why they used rather an extraordinary remedy of bringing a class action complaint because they thought they had to protect their system. They thought, you know what, if an employer is allowed to obstruct an investigation and send word out, if the investigator wants to ask

questions about why was this employee discriminated against and all the witnesses are going to be intimidated, then the whole system is going to break down.

The Commission almost felt like they were in the defense mode, they had to protect the system and that's why they filed this complaint.

As far as the merits of that, that should be worked out at the Commission level. Maybe the Post-Gazette will win everything. Maybe the Post-Gazette will say this is all a misunderstanding, or yeah, we agree with your 127-page position statement. I don't know if they are going to win or lose at the Commission level.

Again, I'm representing a government entity. I want to make my system work. Let us work that out. We got a good system. We're very proud of it. We have professionals that work there.

As I said in my brief, I bragged about how good our system is with the rules that are recently updated. We are proud of our system and this is an attack against our system. This is basically saying you guys are just little people, you don't know how to handle First Amendment issues, you are not really important, we are going to take our case to federal

court and we're going over your head. Of course, the Commission is not going to feel good about it. So I guess that's why we're here.

THE COURT: I guess as I'm thinking, again, I would want to hear from Mr. Corn-Revere on this, whether or not the Post-Gazette would take the position that their First Amendment defenses would apply to the separate issue of whether or not employees were retaliated against for supporting Ms. Johnson or speaking out against Ms. Johnson versus the issue of the Post-Gazette's decision to not allow Ms. Johnson to write certain stories that she tweeted on.

If the First Amendment defense doesn't apply to the 60 other employees and what has motivated the Commission to get involved is the 60 other employees I'm just thinking from a practical matter, why doesn't the Commission just kind of sever out the Johnson tweet issue, let that proceed in an ordinary course of an EEOC type of claim brought by Ms. Johnson and then focus more -- I don't run the Commission but I'm just sort of thinking about --

MR. KERR: You took the words right out of my mouth. The Commission may do that, but, again, you are right into abstention. That is something the Commission should do. Again, the Post-Gazette may win on all these

issues. That's why I keep saying what they are doing, they are trying to make you the Commission. That wasn't a Freudian slip on the Court's part. That is exactly what they are trying to do.

We don't know what we don't know. Questions like were there material adverse actions against some of these 60 people. We don't know because we got stopped in our tracks.

Try filing a 1983 injunction against the state police or the FBI when they are in the middle of their investigation and asking for their work product. That's a criminal defense counsel's dream scenario. I guess any good criminal defense counsel could get a jury acquittal but it takes a really good one to prevent his client from ever being investigated. That is why the Younger case came along and that is why the courts are universally hostile against this collateral attack or preemptive strike coming down on the head of the state troopers or the FBI or any of these agencies.

They're saying you know what, let us do our investigation first. Maybe you will be exonerated. Maybe we won't even charge you but basically to obstruct our investigation, I don't mean to use a pejorative word but that's really what they are doing, they are obstructing our investigation. So we're saying maybe

you are jumping the gun. Maybe there is nothing there. Let us do our job and investigate this. You will have all the opportunity to serve all your defenses but you can't kill our investigation or we will be out of a job and that's really where we are at, Your Honor.

Getting back to the 30,000 foot level, my client has kind of like macro concerns, like, holy mackerel, if we lose this, what that is going to say is any time there is a complaint by an employee of the newspaper, that's hands off. We already got burned in the Post-Gazette case, and we are just not going to take complaints by people at newspapers because the Post-Gazette kind of set a precedent they are going to file a 1983 case or whatever.

I don't know if those global or macro issues are before the Court but that's my client's concern. That's why I said kind of in an almost over general manner at the beginning of my first brief, I said I think what the Post-Gazette is trying to do is they are trying to carve out a blanket immunity exception similar to the *Hosanna Paper* cases and things like that.

Maybe the United States Supreme Court will eventually grant newspaper organizations such broad relative immunity from employment discrimination cases. That hasn't happened yet and I don't think these facts

would support this being the test case for doing that.

I don't know if the Post-Gazette has some larger agenda or whatever to make good case law but not on these facts.

So I think I'll shut up right now. Judge, I'm talking too much.

THE COURT: Thank you. Very helpful. I appreciate it.

Mr. Corn-Revere, do you want to respond?

MR. CORN-REVERE: Yes. Thank you, Your Honor. Again, I will try not to take too much time.

First of all, I want to say just a couple things. One, I appreciate Mr. Kerr's position. It's well stated. I want to assure him and the Commission this case is not filed out of disrespect to the notion that the agency or state courts can't function, rather that this is not an appropriate case to proceed.

As we tried to work out in advance, this is a unique case for a couple of reasons, and one of them first pertains to Younger because of the unique posture of the case. It isn't just the 1983 case with the PHRC but the 1981 case is already going to be heard by the court, the First Amendment issues are already before the court. So the concerns about duplicative state and federal action, the concerns about comity are to a large

extent mitigated because those issues are already before the court. They are going to be decided. We can discuss later on to the extent to which they overlap and be dispositive but in any event, you don't have the concerns in this case about respect for state procedures that you have in one of the Younger cases where you don't have parallel cases involving the same set of facts, involving some of the same constitutional issues or all of the same constitutional issues that are already before the court and are teed up for a decision.

I appreciate the fact that Mr. Kerr says we might well prevail on the First Amendment part of the case. I'm hoping we will, but in that case, to whatever extent the Court focuses on those issues, the 1981 case, according to Mr. Kerr, that should bind the Commission in whatever they decide to do going forward.

So it's that in the unique posture that the Younger issue comes up; and by the way, that sets this case apart from every other Younger case that he has mentioned err none where you already have the court having jurisdiction over the constitutional issues, over the same factual issues as in the other proceedings.

Secondly, Mr. Kerr says if you accept the Post-Gazette's position that eliminates Younger's doctrine whenever a party thinks they have a winning

argument, they are going to simply present that argument and try and bypass the same procedure. That's not the situation here at all.

We are arguing that Younger doesn't apply because of the facts and circumstances of this case and particularly because of the constitutional arguments.

Now, Mr. Kerr points out that many of the Younger precedents including *Dayton*, *Middlesex* and cases like that involve First Amendment issues but it requires a more nuanced look and a more precise look at what those First Amendment questions are.

This is not a case, as we pointed out in our papers, where the Post-Gazette is arguing that it is not subject to antidiscrimination law at all. It's not arguing as in many of these other cases for a blanket immunity from all inquiry. It's arguing that conducting the investigation in a matter that focuses on editorial standards raises a unique First Amendment problem by which going through the state and local procedure is going to be its own First Amendment infringement.

I think you can look at both the religion and press cases to understand what kind of a nuance inquiry is required and it comes up in both contexts.

In religion cases, the question is whether or not the inquiry requires an examination of church

doctrine, not that the religious institutions are immune absolutely from employment or antidiscrimination law. It's just the nature of the inquiry.

So in *Dayton Schools*, there you are talking about a standard employment question, whether or not the church can simply claim that it's not subject to those laws. It is a First Amendment issue but it wasn't one that required looking into matters of church doctrine.

The Third Circuit in *Curay-Cramer* explored the distinction and went into an extended analysis of *NLRB v. Catholic Bishops of Chicago* which explores these issues, said it would present a problem to rule on the relative similarity of offenses against a particular church doctrine. The Court went on to say, it is difficult to imagine an area of employment relation less fit for scrutiny by the secular courts. In that case the Court dismissed the claim that would have required an investigation.

Now, in the press cases, different track from the religion cases themselves but you have the same kind of division between what kinds of First Amendment issues may raise a concern for the state proceeding to go forward than in others. So if you are simply saying that we are a newspaper, we are immune from any kind of review by an employment agency or by an

anti-discrimination agency, then that kind of First Amendment defense isn't going to give you a reason to bypass the state procedure. It is the nature of the inquiry and so, for example, in the NLRB cases, we talk about labor law. When they talk about what kinds of investigations where government interests are opposed, it says, you can apply neutral economic regulations, you can apply labor law to press agencies but you cannot apply it in such a way that you look at the editorial function.

Again, some of the same cases that we cited when we were discussing the 1981 action are applicable here. *Newspaper Guild of Greater Philadelphia v. NLRB*, protection of editorial integrity is within the First Amendment zone of protection and, therefore, entitled to special consideration.

Ampersand Publishing v. NLRB and McDermott v. Ampersand Publishing, and McClatchy Newspapers v. Nelson, all of those cases talk to when you are looking at specifically the editorial function, that's where you draw the line between what is an admissible inquiry and what is not.

Your Honor, you had asked the question about whether or not there was a different inquiry in this administrative case as opposed to the Johnson case and

whether or not that raises different First Amendment issues and that's where we come back to the ability to apply and enforce editorial standards.

This case really comes back down to the denial of someone's ability to pitch a story and others who supported that reporter and the three questions posed by the Commission are these:

Claims that the Post-Gazette disallowed an African-American journalist to cover protests because of tweets.

Secondly, that the paper subjected other journalists who supported her to, quote, retaliation but here by disallowing coverage or editing their stories.

Or third, disallowed a Pulitzer Prize winning photographer from covering protests after tweeting support hashtag.

Now, again, all of the supposed actions are ones that involve the hard editorial judgment, whether you allow the reporter to cover the riots after taking a public position, whether you allow other reporters to cover the riots after taking a public position, and the same is true in the third question as well, they all boil down to the editorial judgment.

What you might call that, if you wanted to use a pejorative term retaliation, again, that comes down to

the kind of decisions that have been roped off in the First Amendment cases in what is protected by the First Amendment.

Now, Mr. Kerr said there is no limiting principle to preserving Younger if you allow this case to go forward. I think it works the other way around. There is absolutely no limiting principle on what PCHR can deem to be an employment practice.

As I say at Page 1 of their motion to dismiss, all personnel actions taken by newspapers concerning their reporters are subject to their jurisdiction. So there is really no limit to what they can inquire on if a worker at a newspaper takes issue with an editor. It could be they prefer their story appeared on page one instead of page two. It could be they think the editor is being too hash in correcting their punctuation. It could be any personnel action that would be subject to the PCHR's jurisdiction if you can allege that it was motivated by discrimination.

There is simply no end to that, and that's why allowing the proceeding to go forward by itself is the violation, creates the First Amendment problem because you can imagine no matter how many due process procedures you have in place, the spectacle of trotting in an entire newsroom staff and editors to explain their

editorial decisions, to explain their editorial policies through an administrative procedure simply is going to be the violation in and of itself as the Supreme Court said in *Catholic Bishops*, the inquiry alone can be the infringement.

That was the point that was made by the Fifth Circuit in the *LA Debating Society* case that Mr. Kerr mentioned and we tried to distinguish.

That was a proceeding where the local Human Relations Commission bringing an action against private clubs and abstention was denied in this case.

The argument was made that the Commission's procedures were fully to protect the *LA Debating Society* because after all, they could raise their objections in front of a hearing, they would have full due process proceedings, they could have review at the state level, and the Fifth Circuit rejected those arguments by saying the idea that you are going to have to have clubs disclose their membership, to have their tax records and all of that in order to defend this process would be a violation in and of itself, and went on to deny Younger abstention saying if those clubs must go public in order to remain private, then their privacy rights ring hollow indeed. The flame is not worth the candle and echoed the language from *NLRB v. Catholic Bishops*, the very

process of inquiry impinge on rights guaranteed by the First Amendment point made in *Cramer* as well.

Mr. Kerr uses the expression you can't unring that bell. That's exactly what happens here if you have a Human Relations Commission being able to conduct a trial on whether or not the editorial decisions were sound or in their case, nondiscriminatory.

Mr. Kerr says, well, let our process go forward. After all, we may find it's okay, but that is the problem. The problem is the notion that newspapers can be called to account for purely editorial decisions, run through months of discovery, run into a trial-type hearing and have to justify why they edited a piece or assigned a story the way they did, and that is the very problem we are talking about and why we filed suit.

Now, originally, when we brought this case, we went through the Commission's process, filed our position paper and answer and hoped that when they saw the full context of what happened, why this affects editorial decisions, that we would be able to sit down and have a conversation and decide whether or not the case could be resolved at that point.

When we suggested we were hoping that would lead to a dismissal of the action, that meeting was canceled. The PCHR was not interested in having that

discussion. So it was only at that point that the Post-Gazette went forward and filed the 1983 action.

As a consequence, we are all here today. As I mentioned at the outset, this is different from other Younger cases, the abstention doctrine doesn't apply here because of the fact there is an ongoing proceeding covering the same issues, the same constitutional questions, but I think, too, the decisions that have been issued on Younger that have denied Younger abstention certainly provide another reason why this Court should deny the Younger doctrine here.

First of all, Mr. Kerr places great weight on *Ocean Grove*. I understand why he does so even though it's not precedential. It does not establish a bright line. That's one of the things to remember in the abstention cases, they all apply a range of factors because it is an equitable decision made by the Court to determine whether or not abstention makes sense in this case.

So I think when you take the fact that this is a matter where the courts already have jurisdiction and apply the other Younger factors, it underscores the reason why abstention should be denied. It's not a bright line saying if the state agency has proceeded, then we are at an end.

By the way, when Mr. Kerr was talking about the way in which this proceeding began, that it was simply the state agency deciding it was going to take action because it was particularly concerned about the situation, that means there was no opportunity, no warning, no advance notice that would have allowed the Post-Gazette to come to court first before the state proceeding started, which sets a depart from cases like *Telco Communications* and the LA, *Louisiana Debating and Literary Society* case. If that's the case, then local governments can simply forestall review by state courts by initiating a proceeding and saying see us in two years, see us whenever, we are going through our process and we can violate rights along the way.

Getting back to the Younger cases, there are a number of them where matters are at an early stage in the proceedings, as they are here, and courts have found that abstention is not warranted. By the way, many of these are recognized in the most recent precedent from the Third Circuit on this, the *PDX North* case which cites a number of these with approval. One of them is the Seventh Circuit decision in *Mulholland v. Marion County Election Board*, another is the case I just mentioned a minute ago, the *Telko Communications v. Carbaugh*. They are all involving First Amendment issues

where the Courts said where you have a proceeding that is at an early stage of proceedings that you are not going to intrude too greatly on the local proceeding and you have these weighty First Amendment issues, abstention is not warranted.

The *PDX* case itself talks about how the difference between where you have a proceeding that is well established, well into the process compared to one where it's really at its beginning. That's not what would be considered an ongoing state proceeding. Again, *PDX North*, it was a split decision where one party that was subject to audits by the state tax and labor board where abstention was granted and then another one that was subject to an audit letter where abstention was denied.

Mr. Kerr tries to distinguish that by saying it was just an audit letter, but under New Jersey law, the New Jersey Unemployment Compensation Act requires employers to provide records to the auditor on examination subject to judicial supervision.

It certainly could have been considered to be an ongoing state proceeding, but the Third Circuit said it wasn't far enough down the road to be considered an ongoing state proceeding.

I think if you look at those cases cited with

approval by *PDX North*, you'll find this falls more in line of that line of cases or those sort of cases where the first *Middlesex* factor is not met.

As to the final *Middlesex* factor, those are the ones I was talking about earlier typified by the *LA Debating* and *Literary Society* case where going through the proceeding itself is the violation and creates the tension with the First Amendment. So regardless of how many well-intentioned due process protections are provided, when you are allowing a state proceeding to go forward where by its nature it is bringing in newspaper editors and other reporters to justify what editorial choices they have made, then that's precisely the kind of administrative set of procedures that cannot protect against the violation of the important constitutional interests.

To sum up, this is not an argument either for saying that Younger doesn't apply whenever you think you have a winning case, no. This is a really unique situation which is why Mr. Kerr would not have found hundreds or thousands of cases during his cursory review, why he hasn't found more cases like this. It's really as unique as any case I have ever seen.

It's not a case where we are simply arguing because this is a newspaper, employment law, not

anti-discrimination law, doesn't apply. No. This is a case where a local government is seeking to inquire into the editorial processes of a newspaper creates a First Amendment problem that requires action by a federal court, and that's why we're here today.

Thank you, Your Honor.

THE COURT: Thank you very much.

Mr. Kerr, any final last words here.

MR. KERR: 30 seconds, Your Honor.

With regard to Post-Gazette's First Amendment defenses, I think they are very interesting. We just think they should be made at state court because that's what our Constitution says, that's what federalism is.

With regard to the two cases he cited, *Mulholland* and *Telco Communications v. Carbaugh*, I don't want to sound sarcastic but the great bard's phrase, hoisted up with his own petard comes to mind. If you read those cases, in *Mulholland*, the Court held that a plain election board hearing was not an ongoing civil proceeding so as to qualify for abstention because the hearing board lacked authority to mete out any meaningful sanctions. Yet the Court cited *Dayton Christian Schools*, a civil rights investigation as the exact type of proceeding that has authority.

If you look at *Telco v. Carbaugh*, though the

abstention was at issue, the Court decided not to abstain because no judicial proceeding had commenced. The plaintiff had only received a letter listing possible charges and an invitation to an informal factfinding conference.

Then the Court cited *Middlesex* as the perfect example when judicial proceedings had started. In that case, plaintiff received a final ethics charge which is exactly tantamount to what happened here. We received a charge and the charge was answered.

So if you actually look at those cases, they actually support our theory that we're pretty far down the line. We crossed the threshold as soon as the complaint was filed. We think Younger was met.

Again, I am not trying to poo-poo the First Amendment argument. It's very interesting. They may win but in our system of constitutional law, we should respect the state courts and allow them to be voiced there.

That's all. Thank you, Judge.

THE COURT: Thank you to both of you. Thank you to all counsel on well-argued motions, very interesting issues.

Because of some of the complexities of these issues, I'm obviously going to take both motions under

advisement. I would also like to order a copy of this transcript to be split, I suppose split three ways in terms of the cost between each of the parties here and then we'll have that transcript docketed in both of the cases, but I think I would like to look at the transcript for purposes of deciding the pending motions. So with that, I appreciate everyone's time.

Is there anything further that needs to be brought to my attention at this point in time? Mr. Cordes, I'll start with you?

MR. CORDES: No, Your Honor.

THE COURT: Thank you.

Mr. Kerr?

MR. KERR: No, Your Honor. Thank you.

THE COURT: Mr. Corn-Revere?

MR. CORN-REVERE: Not from us, Your Honor.

THE COURT: Thank you, everyone.

Have a good day. Take care.

(Whereupon, the above hearing concluded at 1:00 p.m.)

I hereby certify by my original signature herein, that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

S/ Karen M. Earley
Karen M. Earley
Certified Realtime Reporter